Nos. 15-1217 & 15-1226

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner/Cross-Respondent

v.

TITO CONTRACTORS, INC.,

Respondent/Cross-Petitioner

ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1217
	*	15-1226
	*	
v.	*	
	*	Board Case No.
TITO CONTRACTORS, INC.	*	05-CA-149046
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Court Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties, Intervenors, Amici. The Board is the petitioner/cross-respondent before the Court. Tito Contractors, Inc. ("Tito") is the respondent/cross-petitioner before the Court. The Board's General Counsel, Tito, and the International Union of Painters and Allied Trades, District Council 51, AFL-CIO ("the Union") appeared before the Board in Case 05-CA-149046.

B. Ruling Under Review. The case involves the Board's application to enforce and Tito's cross-application to review a Decision and Order the Board issued on June 18, 2015, reported at 362 NLRB No. 119.

C. Related cases. The ruling under review has not previously been before the Court or any other court. There are no related cases pending before the Court.

/s/ Linda Dreeben
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Dated at Washington, DC
this 7th day of March, 2015

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

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TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

Statutes: **Page(s)**

Regulations:

* Authorities upon which we chiefly rely are marked with asterisks.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce the Board's Order issued against Tito Contractors, Inc. ("Tito"), and on Tito's cross-petition for review of the same Order. The Board found that Tito violated Section 8(a)(5) and (1) (29 U.S.C. §§ 158(a) (5) and (1)) of the National Labor Relations Act, as amended ("the Act")

(29 U.S.C. §§ 151, et seq.), by refusing to bargain with the International Union of Painters and Allied Trades, District Council 51, AFL-CIO ("the Union"), as the duly elected collective-bargaining representative of its employees.

The Board's Decision and Order issued on June 18, 2015, and is reported at 362 NLRB No. 119. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) (29 U.S.C. § 160(a)) of the Act. The Board's Order is final with respect to all parties. The Board applied for enforcement on July 14, 2015, and Tito cross-petitioned for review on July 16. Both the application and the petition are timely as the Act imposes no time limit on the initiation of enforcement or review proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the underlying unfair labor practices occurred in the District of Columbia.

Because the Board's Order is based, in part, on findings made in the underlying representation proceeding, the record in that proceeding (No. 05-RC-117169) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). Section 9(d) does not give the Court general authority over the representation proceedings. Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify or set aside in whole or in

part the unfair-labor-practice order of the Board. The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation cases in a manner consistent with the Court's ruling. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUE

Whether the Board acted within its discretion in determining that a unit of all Tito's eligible employees constitutes an appropriate unit for collective bargaining, and therefore properly found that Tito unlawfully refused to bargain with the Union as the duly certified representative of its employees.

STATEMENT OF THE CASE

This case involves Tito's refusal to bargain with the Union in order to test the underlying certification. The Union petitioned to represent an employer-wide unit of Tito's eligible employees, with limited exceptions. After a representation hearing, during which Tito failed to rebut the presumption that an employer-wide unit was appropriate, the Board's Acting Regional Director directed a representation election. Tito appealed the decision. The Board examined Tito's claims but denied the appeal. The Union won the election and was certified as the

exclusive collective-bargaining representative of Tito's employees. Thereafter, Tito refused to bargain with the Union. The Board found that Tito violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the duly certified representative of its employees.

Tito does not dispute that it has refused to bargain with the Union. However, it claims that an employer-wide unit of its employees is an inappropriate unit and the Board should not have certified the Union. If the Court upholds the certification, the Board's Order is entitled to enforcement.

I. THE BOARD'S FINDINGS OF FACT

Tito employs approximately 105 employees and provides general contracting, construction, painting, and recycling services. (JA 32-33, 118.)[1] Its main office is located in northwest Washington, D.C., where Tito's managerial, labor relation, and administrative personnel work. (JA 34-35, 118.) At that same location, two mechanics perform maintenance work on Tito's company vehicles. (JA 20, 118.)

Tito also operates a warehouse in Kensington, Maryland. (JA 20, 34, 118.) One full-time employee works at this location. (JA 20, 118.) That employee is responsible for coordinating deliveries and organizing the warehouse. (JA 20, 118.) Although most of his work is done alone at the warehouse, he has worked

[1] In this brief, "JA" refers to the Joint Appendix.

with other employees, and has assisted with projects outside of the warehouse. (JA 118, 162.)

Tito employs laborers who perform various tasks, including masonry, tile and floor installation, carpentry, painting, building repair, trash removal, and snow removal. (JA 21, 32, 36, 119.) Once laborers are assigned a job site, they typically report directly to the customer location, not to Tito's office. (JA 36, 119.) Tito's customers are typically state and local government entities. (JA 36, 119.) Particular contract requirements are often set by the customer. (JA 22-23, 119.) For example, some customers request particular laborers, require that the laborers pass background checks, or require that the laborers maintain licenses. (JA 23, 119.)

In addition, Tito's employees work at one of four recycling facilities, performing tasks including sorting recycled materials, providing traffic control, cleaning equipment, and performing grounds-keeping. (JA 25-28, 119.) Recycling employees' tasks depend on their worksite assignments. (JA 25-29, 119.) Each facility is managed under one of three separate contracts between Tito and the Maryland Environmental Service. (JA 23, 119.) Each of the contracts for the recycling facilities sets certain employment terms—including minimum rate of pay, number of employees, health benefits, and number of hours each employee works. (JA 25-28, 120.)

II. THE BOARD PROCEEDINGS

A. The Representation Proceeding

The Union filed an election petition seeking to represent all of Tito's employees, excluding its project managers, recycling supervisors, clerical employees, managerial employees, professional employees, guards, and statutory supervisors under the Act. (JA 116.) In total, there were approximately 88 employees in the petitioned-for unit. (JA 117.) A pre-election hearing was held on December 2, 2013, to determine the appropriateness of the unit and the status of certain employees. (JA 116.) At the hearing, Tito argued that the proposed bargaining unit was inappropriate. (JA 117.)[2] Because the proposed unit was employer-wide, and thus presumptively appropriate under Board law, the Hearing Officer permitted Tito to submit a detailed offer of proof explaining its contentions on unit appropriateness, including "specific, detailed evidence in support of [its] position and witnesses who w[ould] provide that evidence" if called to testify at the hearing. (JA 15.) Tito thereafter submitted an offer of proof on the record. (JA 19-29.) After receiving and considering the offer of proof, and consulting with the Acting Regional Director, the Hearing Officer declined to permit live testimony on the issue because, even assuming the truth of Tito's evidentiary offer, he found it

[2] Tito separately argued that certain employees in the proposed unit qualified as statutory supervisors under Section 2(11) of the Act, and therefore should be excluded. Tito has abandoned that claim, and thus it is not discussed herein.

insufficient to overcome the presumption that the petitioned-for unit was appropriate. (JA 29.)

Following the hearing and post-hearing briefing, the Board's Acting Regional Director issued a Decision and Direction of Election on December 13, 2013, finding the petitioned-for unit appropriate. (JA 117-18.) Tito filed a request for review with the Board, challenging the appropriateness of the unit. Meanwhile, a mail ballot election was held between February 28 and March 14, 2014. The election ballots were impounded pending resolution of the request for review.

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the request for review on November 17, 2014. (JA 162). In its Order, the Board noted the presumptive appropriateness of an employer-wide unit, and Tito's failure to overcome the presumption. (JA 162 at n.1.) The Board further noted the commonalities among all members of the unit, the lack of any bargaining history with smaller units, and the fact that no party had suggested an alternative unit.[3] (JA 162.)

When the impounded ballots were counted, the Union won the election on a vote of 28 to 13, with 13 challenged ballots, a number insufficient to determine the

[3] On November 25, 2014, Tito filed three objections to conduct during the election, which were subsequently overruled by the Regional Director. Those objections are not at issue in this proceeding, and so they are not discussed further.

election's outcome. (JA 167.) The Union was certified as the exclusive bargaining representative of the petitioned-for unit on February 25, 2015. (JA 176.)

B. The Unfair Labor Practice Proceeding

On March 9, 2015, the Union requested that Tito bargain with the Union. Tito refused in a letter dated March 25, 2015. After investigation of an unfair-labor-practice charge filed by the Union, the General Counsel issued a complaint alleging that Tito's refusal to bargain violated Section 8(a)(5) and (1) of the Act. In its answer, Tito admitted that it refused to bargain but claimed that the certified bargaining unit was inappropriate. The General Counsel filed a motion for summary judgment, and on April 28, 2015, the Board issued an order transferring the proceeding to the Board and a notice to show cause why the motion should not be granted. Tito did not file a response.

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 18, 2015, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) granted the General Counsel's motion for summary judgment.[4] The Board found that Tito had an opportunity to raise all unit issues in the prior representation hearing, and that Tito did not offer to adduce any new evidence in the unfair labor practice proceeding. Accordingly, the Board found that Tito violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

The Board's Order requires Tito to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Board's Order requires Tito, upon request, to bargain with the Union and to post a remedial notice.

SUMMARY OF ARGUMENT

The Board acted within its discretion in determining that an employer-wide unit is an appropriate unit for collective bargaining, and properly found that Tito

[4] Member Miscimarra would have granted review in the underlying representation proceeding, but agreed that Tito did not present any new matters in the unfair-labor-practice case and therefore granting the motion for summary judgment was appropriate. *Tito Contractors, Inc.*, 362 NLRB No. 119, 2015 WL 3814050, at *1 n.1 (June 18, 2015).

unlawfully refused to bargain with the Union as the duly certified representative of its employees.

The unit proposed by the Union here sought to include all eligible employees in an employer-wide unit across Tito's various employment sites, with limited exceptions. An employer-wide unit is presumptively appropriate under well-established Board precedent. The Acting Regional Director determined that Tito's offer of proof, even if assumed true, failed to rebut the presumption with evidence that the employees' interests were so disparate that the Union could not represent them in a single unit, and directed an election. In upholding the Acting Regional Director's decision, the Board noted the commonality among the employees, finding that all the employees work for the same employer in facilities located in a common geographic region and all perform physical labor. The Board further noted the lack of any bargaining history or alternatively proposed unit. Accordingly, the Board concluded that the employer-wide unit was appropriate. Before the Court, Tito has failed to demonstrate that the unit is inappropriate or that the employees' interests are so disparate that the Union would be unable to represent their interests.

Contrary to Tito's contention, the representation hearing was conducted consistent with the Act and the Board's Rules and Regulations, and Tito was afforded ample opportunity to present its position regarding the proposed unit. The

offer of proof procedure used in the pre-election hearing is well established. Tito's failure to meet its evidentiary burden cannot serve as a basis for attacking this well settled procedure. The Board fully considered Tito's objections to the unit, and exercised its discretion in concluding that the petitioned-for unit is an appropriate unit under the Act.

Lastly, the Court may not entertain Tito's belated argument that collective bargaining cannot occur because Tito is a joint-employer with the Maryland Environmental Service. Tito had multiple opportunities to present evidence in the underlying proceeding that the Maryland Environmental Service should be considered a joint-employer, but failed to raise the issue during the course of litigation before the Board. Accordingly, Section 10(e) of the Act jurisdictionally bars the issue from review.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT THE EMPLOYER-WIDE UNIT IS AN APPROPRIATE UNIT AND THUS PROPERLY FOUND THAT TITO UNLAWFULLY REFUSED TO BARGAIN

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ." 29 U.S.C. § 158(a)(5). Here, Tito has admittedly refused to bargain with the Union (Br. 9) in order to challenge the Board's certification of the Union. Tito objects to the Board's certification of the employer-wide unit of its employees, claiming employees have disparate interests. (Br. 28). The Board found that Tito's offer of proof, even if assumed true, failed to demonstrate that the employer-wide unit was inappropriate. As shown below, the Board acted within its broad discretion in overruling Tito's challenges to the appropriateness of the unit and certifying the Union. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 329-30, 335 (1946); *accord Serv. Corp. Int'l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007). Accordingly, Tito's refusal to bargain violated Section 8(a)(5) and (1) of the Act. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004).

A. The Court Gives Considerable Deference to the Board's Findings Regarding An Appropriate Unit

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen "by the majority of the employees in a unit appropriate for" collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Construing that section, the Supreme Court has stated that the determination of an appropriate unit "lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed." *South Prairie Constr. Co. v. Operating Eng'rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quotation marks omitted); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947) (the Board's selection of an appropriate unit "involves of necessity a large measure of informed discretion"). *Accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000).

In deciding whether a group of employees constitutes an appropriate unit for collective bargaining, the Board focuses its inquiry on whether the employees share a "community of interests." *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The Board considers such factors as: "skills and duties; wages and benefits; interchange between sites; functional integration; geographic

proximity; centralized control of management, supervision, and labor relations; and bargaining history." *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 240 (D.C. Cir. 2003). Additionally, the Board is permitted to "consider[] extent of organization as one factor, though not the controlling factor, in its unit determination." *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442 (1965) (construing Section 9(c)(5) of the Act). There is "no hard and fast definition or an inclusive or exclusive listing of the factors to consider." *Country Ford Trucks*, 229 F.3d at 1190 (internal quotation marks omitted). The Board instead weighs "all relevant factors on a case-by-case basis" (*id.* at 1190-91), with "no particular factor" controlling. *RC Aluminum*, 326 F.3d at 240.

In analyzing whether employees share a community of interest, the Board is aided by a number of presumptions of unit appropriateness. *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *11 n.16 (2011) ("*Specialty*"), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). These presumptions apply to particular categories of proposed units that meet specific criteria. The majority of these presumptions come from the language of Section 9(b) of the Act, which specifically lists as appropriate units: "the employer unit, craft unit, plant unit, or subdivision thereof. . . ." 29 U.S.C. § 159(b); *Specialty*, 2011 WL 3916077, at *11 n.16. Where a statutory presumption exists in favor of a bargaining unit, the Board

has found that "'a community of interest inherently exists among such employees.'" *See Airco, Inc.*, 273 NLRB 348, 349 (1984) (quoting *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136 (1962) (discussing application of statutory presumption of appropriateness to plant-wide unit)); *Int'l Bedding Co.*, 356 NLRB No. 168 (2011).

The Board consistently has held that an employer-wide bargaining unit is presumptively appropriate. *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998); *Acme Markets, Inc.*, 328 NLRB 1208, 1210 n.9 (1999); *Montgomery Cty. Opportunity Bd.*, 249 NLRB 880, 881 (1980); *Jackson's Liquors*, 208 NLRB 807, 808 (1974). As the Board noted over 60 years ago when discussing an employer-wide unit: "A unit of such scope is the first one called appropriate in Section 9(b) of the Act, upon which the Board's authority to establish collective bargaining units rests." *Western Elec. Co.*, 98 NLRB 1018, 1032 (1952). The Board has recognized that an employer-wide unit offers advantages because it allows for efficient collective bargaining between management and the union, particularly where the employer maintains centralized management of labor relations. *See Petrie Stores Corp.*, 266 NLRB 75, 77 (1983) (finding individual store units inappropriate because managerial decisions were made at the companywide level); *Local 1325, Retail Clerks Int'l Ass'n, AFL-CIO v. NLRB*, 414 F.2d 1194, 1202

(D.C. Cir. 1969) (noting "considerable degree of central office control over [] hiring and operations" may justify an employer-wide unit).

The Board will approve an employer-wide unit unless the presumption in favor of such a unit is rebutted by detailed evidence demonstrating that the unit is inappropriate. *Greenhorne*, 326 NLRB at 516; *Western Elec.*, 98 NLRB at 1032. Specifically, the party objecting to a presumptively appropriate unit, such as the employer-wide unit here, bears the burden of "demonstrate[ing] that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit." *Airco, Inc.*, 273 NLRB 348, 349 (1984); *see Int'l Bedding Co.*, 356 NLRB No. 168 (2011). Although this burden is not easily overcome, it is not insurmountable. *See Yellow Transit Co.*, 92 NLRB 538, 539 (1950) (rejecting employer-wide unit where employees were widely dispersed over several states, hiring was done at the local level, and bargaining history favored smaller units). Therefore, an employer challenging the Board's determination of an appropriate unit may not merely point to the existence of a more appropriate unit. *See, e.g.*, *Country Ford Trucks*, 229 F.3d at 1189-91; *see also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) ("it is not enough for the employer to suggest a more suitable unit"). Rather, the burden of proof is on the objecting party to show that the chosen unit is "truly inappropriate." *Country Ford Trucks*, 229 F.3d at 1189.

It is well-established that the Board "need only select *an* appropriate unit, not *the most* appropriate unit." *Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009) (internal quotation omitted). "This court will uphold an NLRB bargaining unit determination unless it is arbitrary or not supported by substantial evidence in the record." *Country Ford Trucks*, 229 F.3d at 1189. As this Court repeatedly has explained, "'the existence of alternative units which are 'appropriate' will not alone warrant reversal if the Board has chosen some other unit which is also appropriate.'" *Country Ford Trucks*, 229 F.3d at 1189 (quoting *Local 1325, Retail Clerks*, 414 F.2d at 1202).

The focus of the Board's determination remains the unit for which the petition has been filed because under Section 9(a) of the Act (29 U.S.C. § 159(a)) "the initiative in selecting an appropriate unit resides with the employees." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991). Indeed, "the [Board] may simply look at the Union's proposed unit and, if it is *an* appropriate unit, accept that unit determination without any further inquiry." *Country Ford Trucks*, 229 F.3d at 1191 (emphasis added); *see also Cleveland Const., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995) (same). If the unit is not deemed appropriate, the Board will examine any proposals submitted by the employer. *Country Ford Trucks*, 229 F.3d at 1191.

Moreover, the Board's factual findings are entitled to affirmance if they are supported by substantial evidence on the record as a whole, and a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court might have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

As explained below, Tito made an offer of proof, even if assumed true, was insufficient to demonstrate that an employer-wide unit of its employees was inappropriate. Specifically, Tito was unable to demonstrate that employees in the petitioned for unit had interests so disparate that they cannot be represented in a single unit. *Airco, Inc.*, 273 NLRB at 349. Moreover, Tito failed to even suggest another appropriate unit. Under these circumstances, the Board properly determined that the employer-wide unit was an appropriate unit.

B. The Board Acted Within its Discretion in Finding the Proposed Employer-Wide Unit is Appropriate

The unit proposed by the Union here sought to include all eligible employees in an employer-wide unit encompassing all of Tito's employees across its various employment sites, with limited exceptions. The Hearing Officer recognized that the Union's petitioned for employer-wide unit was presumptively appropriate. As discussed above, a unit that includes all of the employer's employees is statutorily recognized as an appropriate unit because the employees presumably share a community of interest with one another as employees of the

same employer. Consistent with well-established precedent, the Hearing Officer required Tito as the objecting party to bear the burden of rebutting that presumption. *Greenhorne* at 516. In particular, the employer must demonstrate that the proposed unit is inappropriate by establishing that the employees' interests are so disparate that they cannot be represented in the same unit. *Airco* 273 NLRB at 349; *Int'l Bedding*, 356 NLRB at 168. Here, Tito was required to present an offer of proof with "specific, detailed evidence in support of [its] position and witnesses who will provide that evidence." (JA 15.) The Hearing Officer, while accepting everything that Tito stated in its offer as true, concluded that Tito failed to meet its burden.

In its review of the Acting Regional Director's Decision and Direction of Election, the Board agreed that Tito failed to overcome the presumption of appropriateness in a unit that included all of Tito's employees. Accepting Tito's offer of proof, the Board noted the commonality among the employees, noting that all the employees work for the same employer in facilities located in a common geographic region (Washington, DC and the surrounding areas). (JA 162 at n.1.) The employees all perform physical labor—whether skilled or unskilled. (JA 162 at n.1.) Although there is no formal interchange between the employment sites, there is evidence in the record that some employees interact between sites. (JA 162 at n.1.) Further, there is no evidence of past collective bargaining between

Tito and smaller units of its employees. (JA 162 at n.1.); *cf. Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 39 (D.C. Cir. 2015) (approving smaller unit over larger unit based on bargaining history). Moreover, no party sought to represent any of the employees in a smaller unit, nor did Tito propose any alternative units. (JA 162 at n.1.) *See Overnite Transp. Co.*, 331 NLRB 662, 663 (2000) (noting the Board "may examine the alternative units suggested by the parties").

While Tito points to differences among its labor force, the evidence supports that Tito's labor management relations are centralized. Wages and other terms and conditions of employment are determined and negotiated by Tito's centralized management. (JA 32, 95). While supervisors placed at the job sites are given some discretionary authority, all management authority is located and controlled at Tito's main office. (JA 32, 34). Additionally, Tito's laborers are overseen by floating supervisors and project managers—who move between project sites and ensure some level of consistency on behalf of upper management. (JA 54-55). Thus, despite some differing working conditions among Tito's various employees, collective bargaining through an employer-wide unit is appropriate because of Tito's centralized authority controlling terms and conditions of employment. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 164 (1941) (approving multi-facility unit where facilities had "a substantial degree of local autonomy" and workers maintained moderately different wages, hours, and working conditions but

all labor policies were centrally administered). In the face of the commonality among the employees, who are all employed by Tito, the Board properly found that an employer-wide unit is appropriate to effectuate constructive collective bargaining. Under these circumstances, Tito therefore failed to demonstrate that the unit was "truly inappropriate." *Blue Man Vegas*, 529 F.3d at 421 (quoting *Country Ford Trucks*, 229 F.3d at 1189).

In order to demonstrate that the employer-wide unit is inappropriate, Tito was required to show the employees' interests are so disparate that the Union would be incapable of representing the entire unit. *Airco* 273 NLRB at 349; *Int'l Bedding*, 356 NLRB at 168. It did not do so. Before the Court, Tito repeats its arguments, rejected by the Board, that the employees lack a community of interest because some employees had different job responsibilities, wages and benefits, supervisors, and work sites. (Br. 28; JA 19-29, 145-151.) However, the requirement that a unit be "appropriate" accepts that there will be differences among individual terms and conditions of employment. It does not demand absolute cohesion. *See Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998) (finding unit appropriate even though employees had different benefits, did different work, and had different immediate supervisors). Particularly where a statutory presumption applies to a proposed bargaining unit, variances between job responsibilities and terms and conditions of employment are acceptable and

expected. *See Airco*, 273 NLRB at 349 (approving presumptively appropriate unit even though employees had little contact with each other, different skills, training, and working conditions). The Board here exercised its discretion in determining that enough commonality exists among the workforce to effectuate collective bargaining. Further, as discussed, the differences did not "overcome the presumptive appropriateness" of an employer-wide unit, particularly in light of the commonalities the Board noted among employees. (JA 162 at n.1.)

Moreover, it is well accepted that there may be many appropriate units. *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). While not dispositive, Tito did not propose an alternative unit that the Board could have examined. Rather, here, as before the Board, it argues only that a unit comprised of most of its employees is inappropriate. The Board found that it failed to prove the unit was inappropriate. As noted, the Board applied the presumption in favor of an employer-wide unit recognized by the Act, taking into account the community of shared interests inherent in the employer-wide unit, and determined that the Union could effectively represent the unit. In doing so, the Board properly exercised its discretion and determined that an employer-wide unit of all eligible employees constituted an appropriate unit. *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534 (4th Cir. 1999) (the Board "possesses the widest possible discretion in determining the appropriate bargaining unit").

C. Tito's Attacks on the Board's Method of Analysis are Refuted by the Evidence and Applicable Law

Tito makes two related, but ultimately flawed, challenges to the Board's analysis of the proposed bargaining unit. Both arguments fail because they are founded on a disregard for the Board's analysis in the instant case and a misunderstanding of applicable law.

First, Tito claims (Br. 21) that the Board inappropriately applied a "per se" rule on unit appropriateness rather than individually analyzing the proposed unit. The Board's analysis directly refutes this claim. At the pre-election hearing, Tito was invited to present "specific, detailed evidence" in support of its position, and even accepting Tito's offer of proof as true, the Acting Regional Director determined that Tito failed to support its burden of proving that the unit was inappropriate. (JA 15, 121-22.) Following the Acting Regional Director's decision, the Board reviewed the facts submitted in Tito's offer of proof regarding the nature of Tito's operations and the employees' work responsibilities. (JA 118-122, 162.) The Board recognized the presumption favoring the appropriateness of employer-wide units, and agreed that Tito failed to meet its burden of rebutting the appropriate unit determination. (JA 162 at n. 1.) Contrary to Tito's assertions, the Board noted the commonalities between the employees, demonstrating their shared community of interest. (JA 162 at n. 1.) Only after considering all of the evidence did it reach a determination on unit appropriateness. This analysis was fully

consistent with existing Board law, and provided the proper unit consideration required by the Act. *Greenhorne*, 326 NLRB at 516; *Airco* 273 NLRB at 349.

Tito next contends (Br. 23) that the Board improperly considered the "extent of organization" in contravention of Section 9(c)(5) of the Act which prohibits giving controlling weight to the extent of organization.[5] This Court has previously confronted a similar challenge under Section 9(c)(5) to the use of presumptions in determining the appropriateness of bargaining units. In *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515 (D.C. Cir. 1999), the employer argued that the Board's presumption in favor of a plant-wide unit improperly considered the extent of organization. *Id.* at 519. The Court rejected that challenge, stating: "To be sure, by applying the presumption as it does the Board gives the Union an initial advantage should any conflict ensue regarding the proper scope of the bargaining unit. This modest benefit, however, hardly grants 'controlling' weight to the extent the Union has organized the employees." *Id*; *see also Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991) (recognizing "the initiative in selecting an appropriate unit resides with the employees").

Thus, in determining the appropriateness of a bargaining unit, the Board is free to consider the unit proposed by the labor organization as one factor, so long

[5] Section 9(c)(5) states: "In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5).

as it does not consider it the controlling factor. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442 (1965). Here, the Board based its decision on the employer-wide unit presumption and the inherent community of interest shared by a group that encompasses all of the employees of an employer. It bears repeating that, to the extent that Tito believed that the Union was unable to represent the interests of a particular group of its employees, it could have suggested an alternative appropriate unit.[6] It chose not to do so, belying its claim that the Board improperly gave undue consideration to the only proposed unit in the case.[7]

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[6] In the majority of cases that challenge units proposed by a union, the employer proposes an alternate unit that seeks to add groups to the unit because of shared interests or remove others because of their disparate interests. *See, e.g.*, *Specialty*, 2011 WL 3916077, at *1 (employer contended that the petitioned-for unit must include additional employees working at the same facility); *Dpi Secuprint, Inc.*, 362 NLRB No. 172, 2015 WL 5001021, at *4 (Aug. 20, 2015) (same); *Aztar Indiana Gaming Co., LLC*, 349 NLRB 603, 603 (2007) (employer objected to union's proposed unit and suggested two separately appropriate units); *In Re Stormont-Vail Healthcare, Inc.*, 340 NLRB 1205, 1207 (2003) (employer argued the only appropriate unit was an employer-wide unit); *Prince Telecom*, 347 NLRB 789, 789 (2006) (employer argued petitioned-for unit must include employees at all four of the employer's locations, rather than a single location); *In Re Croft Metals, Inc.*, 337 NLRB 688 (2002) (employer argued that certain employees should be excluded from the petitioned-for unit because they lacked a community of interest with other unit employees).

[7] Moreover, the Union agreed to proceed to election with any unit the Acting Regional Director found appropriate. (JA 110-11.)

D. The Representation Hearing Was Properly Conducted and Afforded Tito Ample Opportunity To Present its Position Regarding the Proposed Unit

There is no merit to Tito's claim (Br. 16) that it was denied an appropriate election hearing under Section 9(c) of the Act. Tito had a full opportunity to present its position on unit certification at the pre-election hearing. The procedure used in the pre-election hearing is well established. Tito's failure to meet its evidentiary burden cannot serve as a basis for attacking this well settled procedure.

Section 9(c)(1) of the Act provides that when a representation petition has been filed, and a question of representation exists, the Board "shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c)(1). Representation proceedings are governed by "such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 333 (1946); *see also Inland Empire Dist., Lumber Workers v. Millis*, 325 U.S. 697, 706 (1945) (recognizing that Section 9(c) reflects Congress's intention that the Board be given "great latitude concerning procedural details").

The Board's rules allow a hearing officer to accept a party's offer of proof in lieu of live testimony to avoid the taking of repetitive, unnecessary, or irrelevant evidence. NLRB Casehandling Manual, Part Two, Sec. 11217 (Aug. 2007) ("Casehandling Manual"); *see also Mariah, Inc.*, 322 NLRB 586, 586 n.1 (1996);

In Re Laurel Assoc., Inc., 325 NLRB 603, 603 (1998). Offers of proof are particularly useful where a presumptively appropriate unit is under consideration. Casehandling Manual Secs. 11217, 11226. The offer of proof allows the hearing officer to determine if live testimony is necessary, or if the matter can be resolved without further evidence—making the process more efficient and avoiding an overburdened record. *Bennett Indus., Inc.*, 313 NLRB 1363 (1994); *Mariah, Inc.* at 586 n.1 (1996). The offer of proof procedure is fully consistent with the purposes of the Act, which maintains as a core goal expeditious resolution of representation questions. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 478 (1964) (noting Congress's intention for prompt resolution of representation questions).[8]

Here, the Hearing Officer properly considered Tito's offer of proof regarding the appropriateness of the bargaining unit. After consulting with the Acting Regional Director and determining that the proffered evidence—even accepted as true—would not refute the appropriateness of the unit, the Hearing Officer refused to permit live testimony. (JA 29). This was entirely consistent

[8] Limiting irrelevant evidence is also consistent with broader administrative law principles. *See* 5 U.S.C. § 556(d) (Administrative Procedure Act provision directing agencies to exclude "irrelevant, immaterial, or unduly repetitious evidence").

with Board procedure. Accordingly, Tito's argument that the hearing was improperly conducted fails.

Further, the offer of proof requirement in no way prejudiced Tito. The Hearing Officer, Acting Regional Director, and the Board on review, accepted as true Tito's offer of proof regarding the unit's composition and employees' roles and responsibilities. In doing so, Tito failed to identify any specific pieces of evidence or testimony that would have demonstrated that, as required by the Hearing Officer, the proposed unit was inappropriate. In fact, the procedure placed Tito in the most beneficial position possible because the evidence stated in the offer of proof was treated as fact by all parties, and not subjected to challenge. Consequently, forcing Tito to make an offer of proof in lieu of live testimony did not harm Tito. *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (the Court will not hold that the Board abused its discretion in limiting evidence "unless it clearly appears that the new evidence would compel or persuade to a contrary result") (internal quotation marks omitted).

The three cases cited by Tito (Br. at 19-20) to suggest that the hearing was improper are inapposite. First, both *Barre-National, Inc.*, 316 NLRB 877 (1995), and *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (7th Cir. 1986), involved erroneous refusals to consider the unit determination issue at a Board hearing. In *Barre-National*, the Board found that the Regional Director

erred by deferring a decision on the supervisory status of certain employees until after an election and allowing their votes to be cast and unit determinations made later.[9] 316 NLRB at 878. Likewise, in *Indianapolis Mack*, in the context of a question about whether a new employer was a legal successor required to bargain, the administrative law judge erroneously found that the issue of whether the unit remained appropriate was not properly before her, and refused to admit evidence or consider argument on the issue. 802 F.2d at 283. These cases are clearly distinct from the instant matter, where the Acting Regional Director specifically considered whether the unit was appropriate and resolved Tito's objections to the unit prior to the election. The third case cited by Tito, *NLRB v. St. Francis Hospital*, 601 F.2d 404 (9th Cir. 1979), involved the Board's application of a per se rule that a bargaining unit composed of registered nurses in a non-profit hospital was *irrebuttably* appropriate, and the Regional Director's refusal to consider case-specific facts rebutting the unit's appropriateness. *Id.* at 414. Here, a *rebuttable* presumption was applied to the petitioned-for unit, Tito was given an opportunity to challenge the appropriateness of the unit, and the Acting Regional Director considered its challenge prior to ordering the election.

[9] While the instant case was pending, but after the representation hearing and Board decision denying review, the Board overruled *Barre-National*. Final Rule, Representation—Case Procedures, 79 Fed. Reg. 74308, 74386 (Dec 15, 2014).

Thus, to the extent the three cases cited by Tito criticize the lack of evidence permitted at the pre-election hearing, they must be read in the context of the substantive unit appropriateness issues presented. *See Barre-National*, 316 NLRB at 878 n.9 (noting decisions on the conduct of pre-election hearings, and the remedies for pre-election errors, are fact specific and must be considered on a case-by-case basis). Each of the three cases involved not only limitations placed on evidence admitted, but also specific refusals to analyze evidence—which ultimately led to unsupported unit appropriateness decisions.[10]

Unlike those three cases, the Acting Regional Director here fully considered the unit appropriateness issue following the pre-election hearing. He accepted the facts contained in Tito's offer of proof and properly applied the Board's long-standing rebuttable presumption of appropriateness. After determining that Tito had failed to rebut the unit's appropriateness, only then did the Acting Regional Director order an election. Moreover, in examining the offer of proof, the Board considered the facts present by Tito as true and evaluated them before agreeing with the Acting Regional Director that an employer-wide unit was appropriate.

[10] Notably, *Indianapolis Mack* did not involve an offer of proof—but instead the employer's failure to make an offer of proof. Indeed, both the *Indianapolis Mack* majority and dissent noted that an offer of proof would have aided in resolving the issue of the appropriateness of the unit. 802 F.2d at 284; *id.* at 286 (Cadahy, J., dissenting).

E. Tito's Belated Argument that Collective Bargaining Cannot Occur Because Tito Is a Joint-Employer Is Barred from Review

Section 10(e) of the Act bars a reviewing court from considering any objection not first urged before the Board, unless the failure is excused by extraordinary circumstances. 29 U.S.C. § 160(e); *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1255 (D.C. Cir. 2012) (noting the Court lacks jurisdiction to consider arguments not first made to the Board); *DHL Express, Inc. v. NLRB*, No. 12-1072, 2016 WL 278075, at *4 (D.C. Cir. Jan. 21, 2016) (same). Regardless of the merits of the new argument, the Court is without jurisdiction to consider it in the first instance. *New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011).

For the first time, Tito broadly asserts (Br. 28) that collective bargaining "may be limited" because Tito acts as a joint employer with the Maryland Environmental Service. Tito could have raised this argument at numerous stages in the litigation—most notably in its offer of proof before the Hearing Officer, in its post-hearing briefing, or in its request for review to the Board. It consistently failed to do so. Tito additionally failed to respond to the Board's notice to show cause in the unfair labor practice proceeding and raise the issue at that time. Tito did not even hint that it was incapable of bargaining over terms and conditions of employment with the Union until its opening brief. Under Section 10(e), the Court may not consider Tito's newly raised argument unless it has shown some

"extraordinary circumstances" to excuse its failure, which Tito has not even attempted to do.

It is true that the Board recently clarified the standard for determining joint-employment relationships. *See Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015). But Section 10(e) bars new issues on appeal even when the Board creates new standards during the course of litigation. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 49 (D.C. Cir. 1990). If Tito truly believed the joint-employer standard was at issue in this case, the proper course would have been to file a motion for reconsideration with the Board under Section 102.48(d)(1) of the Board's Rules and Regulations. 29 C.F.R. § 102.48(d)(1). Such a motion would have put the Board on notice of the challenge, and given it an opportunity to consider the argument. *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008). Tito did not file a motion for reconsideration, nor in any way signal to the Board that it believed the joint-employer standard to be at issue. *See Woelke & Romero Framing, Inc. v. NLRB*,

456 U.S. 645, 666 (1982) (issue was subject to Section 10(e)'s jurisdictional bar because the party asserting it did not file a motion for reconsideration).[11]

[11] In any event, *Browning-Ferris* would add little, if anything, to Tito's new contention, even if it could be considered. *Browning-Ferris* did not create the joint-employer standard, but, as noted, clarified it, reaffirming the central tenants of the standard that have existed for more than three decades. *Browning-Ferris*, 2015 WL 5047768 at *2. Tito has not alleged that *Browning-Ferris* created new law that affects its relationship with the Maryland Environmental Service. To the contrary, Tito's suggested joint-employer claim rests on its view that the Maryland Environmental Service is a classic joint-employer that has already directly affected employees' terms and conditions. *See* Br. 27 (arguing that "the Maryland Environmental Service] *determines* the employees' hours and schedules and may adjust them as it sees fit; [] *must approve* overtime in advance; [] *determines* the number of Tito employees at each facility; [] *sets* the minimum rate of pay and *determines* whether employees are eligible for health benefits; and [] may request the removal of a Tito employee." (Emphasis added)). This argument clearly could have been made under the existing joint-employer standard.

CONCLUSION

The Board respectfully requests that the Court deny Tito's cross-petition for review and enforce the Board's Order in full.

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National Labor Relations Board
February 2016

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1217
	*	15-1226
	*	
v.	*	
	*	Board Case No.
TITO CONTRACTORS, INC.	*	05-CA-149046
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,472 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015 and is virus-free according to that program.

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Dated at Washington, DC
this 7th day of March, 2016

ADDENDUM

Section 7 (29 U.S.C. § 157)
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) (29 U.S.C. § 158(a)(1))
It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 8(a)(5) (29 U.S.C. § 158(a)(5))
It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9(a) (29 U.S.C. § 159(a))
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 9(c) (29 U.S.C. § 159(c))
(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> **(A)** by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or

labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Section 9(d) (29 U.S.C. § 159(d))

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be

included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 10(a) (29 U.S.C. § 160(a))
The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Section 10(e) (29 U.S.C. § 160(e))
The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there

were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 10(f) (29 U.S.C. § 160(f))
Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

NLRB Casehandling Manual, Part Two, Sec. 11217 (Aug. 2007)
Prior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard. If a party refuses to state its position on an issue and no controversy exists, the party should be advised that it may be foreclosed from presenting evidence on that issue. *Mariah, Inc*., 322 NLRB 586 (1996); *Bennett Industries*, 313 NLRB 1363 (1994).

Further, if the unit sought by petitioner is presumptively appropriate, then only limited evidence may be allowed where a party *takes a position* as to alternative units and such evidence may be precluded in certain circumstances. *Laurel Associates, Inc.*, 325 NLRB 603 (1998). The party should be offered an opportunity to make an offer of proof. Sec. 11226. After all such testimony and evidence has been received into the record, the party should state its position again.

NLRB Casehandling Manual, Part Two, Sec. 11226 (Aug. 2007)
When the hearing officer rejects proffered testimony or refuses to allow a line of testimony, it may be appropriate to suggest that the party adversely affected make an offer of proof. If after reviewing the offer of proof, the hearing officer continues to reject the testimony or line of inquiry, a brief record of the rejected material is present in the record for later review. The offer, in essence, is a statement that, if the named witness were permitted to testify on the matters excluded, he/she would testify to specified facts. The facts should be set forth in detail; an offer in summary form or consisting of conclusions is insufficient. An offer of proof may take the form of an oral statement on the record, a written statement to be included in the record (copies and service as with motions, Sec. 11225) or in the unusual situation, with permission of the hearing officer, specific questions of and answers by the witness. The latter often lengthens the record unnecessarily and should be avoided.

UNITED STATES COURT OF APPEALS
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v.	*	
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	*	
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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

s/Linda Dreeben
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Dated at Washington, DC
this 7th day of March, 2016